IN THE

Supreme Court of The United States

October Term 1965

No. 296

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, ----------*Petitioners,*

v.

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of Estate
of Charles D. Dunne, Deceased,----------*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF RESPONDENTS JAMES E. DUNNE, II AND MOSES MASTER, ADMINISTRATOR.

STATEMENT OF THE CASE BY RESPONDENTS JAMES E. DUNNE, II AND MOSES MASTERS, ADMINISTRATOR.

Without repeating or contradicting the facts as set out by the petitioners or the respondent, All States Investors, Inc., it suffices to say that following such litigation in which the jury

had hung following an extended trial, these respondents anticipated successful conclusion of another jury trial of the two cases, being jointly heard. Such new trial had commenced on January 21, 1963. It appeared that patent errors of the proceeding trial were not being repeated. Without discussing details on January 23, 1963, on the third day of the trial, the parties announced that "* * all matters have been settled in each suit * *". Such settlement provided for respondent, James E. Dunne II to pay $15,000 over a period of five years, being $3,000 per year, without interest, final order of dismissal to be entered upon the closing within a thirty day period. Such respondent promptly executed and delivered his note. Petitioners were purchasing the bonds in litigation held by the plaintiffs, respectively. Since the contemplated settlement was not completely effectuated due to failure of respondent, All States Investors, Inc. to deliver the bonds, which it allegedly owned and held, respondent James E. Dunne II has taken no part in the extended controversy attributable to such non-delivery, other than was necessary in order to maintain the order of dismissal as to himself and respondent Moses Master, Administrator. Patently the settlement burden was carried by petitioners. Respondent James E. Dunne's $15,000 note, payable to petitioners, was a contribution toward the purchase of the bonds in controversy based on and affective when the settlement should be completed within the thirty day period.

Neither respondent James E. Dunne II, nor respondent Moses Master, Administrator, has participated actively in the controversy between petitioners and respondent, All States Investors, Inc., since they agree with petitioners that failure of respondent, All States Investors, Inc., to deliver its bonds voided any right to receive the agreed purchase price of $90,000 in cash, Plus petitioner's $15,000 note.

Respondents James E. Dunne II and Moses Master, Administrator, do not travel with respondent, All States Investors, Inc.

in assuming that "• • petitioners took an all-or-nothing, shoot-the-works approach, even though the odds were clearly against them. • •" Admittedly petitoners were buying the bonds. In an interlocutory order entered January 8, 1958 "• • the Court heard arguments as to the validity of the West Buechel bonds in the amount of two million dollars and made a ruling that the bonds were not issued in conformity to the laws and Kentucky Statutes and were therefore invalid." (Petitioners' Appendix pp. 1). On January 17, 1959 respondent James E. Dunne II undertook to appeal from such interlocutory order (Petitioners' Appendix pp. 3-4). In another memorandum entered February 6, 1959 the Court in an extended opinion overruled such motion to appeal and entered an order on February 7, 1959 "That the record not be prepared and forwarded to the United States Court of Appeals for the Sixth Circuit". (Petitioners' Appendix pp. 4-8). Such Court in reaching the above stated decisions directly violated instructions issued to it by such U. S. Court of Appeals for the Sixth Circuit under closely related facts in Sunbeam Corp. v. Richardson, 24 3F. 2d 501, and in reversing such Court said:

> "• • In Walker v. Felmont Oil Corp., 6 Cir., 240 F. 2d 912, 916, this court noted that 'Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of lower federal courts. • • • "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." • • • There is no direct ruling by the Kentucky Court of Appeals on this question. No matter how seasoned the judgment of the District Judge may be, it cannot escape being a forecast rather than a determination. • • •'
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> "Under the circumstances of the instant case, we are of the view that comity and a regard for the consideration of the court of last resort in Kentucky require that the determination of the constitutionality of the State Fair Trade Act under the State Constitution be held in abeyance until the issue has been determined by the Kentucky Court of Appeals. • •"

Since patently the ultimate decision on the validity of the bonds involved will be made by Kentucky courts, the question of value remains for future decision. U. S. Court of Appeals for the Sixth Circuit in its opinion of April 7, 1965 concluded that "••• The bonds were in default, were generally regarded as worthless and had been adjudicated invalid. Although not actually adjudicated the trial Judge expressed the opinion that any recovery on the bonds was barred by the statute of limitations." (Petitioners' Appendix pp. 98).

Notwithstanding the interlocutory background and the caution contained in the Sunbeam case, supra, the Court saw fit to declare the bonds invalid, with the result that the Court of Appeals was patently influenced and failed to recognize its rule laid down in the Sunbeam case, supra. The parties had made a buy and sell settlement agreement. The Court, sustained by the Circuit Court, has seen fit to modify the agreement as made by the parties. Under such circumstances respondents James E. Dunne II and Moses Master, Administrator, respectfully insist that consideration for the $15,000 note executed by James E. Dunne II was not received and consequently his note should be cancelled.

Section 355.8-405(2) KRS (Petitioners Appendix pp 122b) specifically provides procedure to be followed where securities are lost, destroyed or stolen. It can hardly be contended that the personal bond, without any security being posted, would satisfy the "•• reasonable requirements imposed by the issuer ••". Few financial institutions accept personal endorsement on paper without additional quick asset security.

CONCLUSION

It is respectfully insisted that the settlement agreement was not consummated and consequently is void.

Respectfully submitted,

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